"INTENTION" AS A REQUIREMENT FOR DE JURE SCHOOL SEGREGATION

In 1954 the United States Supreme Court held that separate but equal schools were constitutionally prohibited.[1] From then until 1973, all of the school desegregation cases decided by the Court involved state statutes compelling or permitting segregation of public schools along racial lines. In these "southern" de jure segregation cases, state action was manifestly present for purposes of invoking the equal protection clause of the fourteenth amendment. In 1973 the Court decided its first "northern" case, *Keyes v. School District No. 1*,[2] in which no statute was involved, and defined de jure or actionable segregation as "a current condition of segregation resulting from intentional state action."[3] The Court did not define "intent," however, and as a result of that omission the lower federal courts are now in disagreement over the proper interpretation of that word. The Second Circuit Court of Appeals, for example, has used an objective tort standard of reasonably foreseeable consequences to find intent.[4] In contrast, a Pennsylvania district court in *Husbands v. Pennsylvania*[5] rejected the Second Circuit's standard and held that intent means subjective purpose or motive to segregate. This much narrower interpretation of the *Keyes* "intentional state activity" requirement may have considerable impact on northern plaintiffs. In fact, it may result in a standard that is nearly impossible for northern plaintiffs to meet with respect to the quality and quantity of evidence necessary to sustain their burden of proof.

This Note will analyze the distinction between de jure and de facto segregation subsequent to the *Keyes* decision as well as the rationale of the *Husbands* decision, especially the manner in which that court defines the quantum of evidence necessary to support a finding of intentional de jure segregation under the fourteenth amendment. It will also discuss the disagreement among the lower federal courts on the proper test to be used in finding intentional state activity. Finally, it will suggest that the Sixth Circuit's method of combining a test of reasonably foreseeable consequences—which may result in a rebuttable presumption of liability—with the available defense of consistently nondiscriminatory decision making by the defendant

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[1] Brown v. Board of Educ., 347 U.S. 483 (1954).

[2] 413 U.S. 189 (1973).

[3] *Id.* at 205.

[4] Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975).

[5] 395 F. Supp. 1107 (E.D. Pa. 1975).

is the proper one in view of the letter and spirit of the United States Supreme Court's desegregation cases, both southern and northern.

I. De Jure and De Facto Segregation: A True Distinction?

In principle, the distinction between de jure and de facto segregation is readily apparent. The first, as exemplified in its purest form in the early southern cases,[6] results from the application of a state statute. The second arises from a multitude of factors, none of which is caused by discriminatory state action. The pure de facto situation, if it existed, would be analogous to that found at a large cocktail party where people voluntarily separate into smaller groups according to their ages, professions, interests, and perhaps races. Obviously, in that situation the separate groups do not arise because of discriminatory action by the host or anyone else in a position of authority. Moreover, the groups are equal and enjoy freedom of movement.

Northern school boards have traditionally contended that their segregated neighborhood schools developed in precisely this neutral manner, *i.e.*, in drawing school boundary lines or building new schools they took the neighborhoods as they found them. The availability of optional transfer zones[7] allegedly ensures freedom of movement for school children. Consequently, the school boards argue, they are not responsible for, nor do they cause, the school segregation that often results from a neighborhood school system; thus there is no state action. The segregation is de facto, and no legal remedy is available because there is no duty to desegregate when the segregation results from complex urban human movement over which school officials have exerted no influence.

The fundamental flaw in the argument of the northern school boards lies in its disregard for the reciprocal effects of zoning or building decisions and neighborhood school districting. The building of a new neighborhood school in the center of a predominantly black neighborhood will tend to increase the black population of that area. It will not induce white families to move into that neighborhood; indeed, it more likely will produce "white flight," if there are any

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[6] Brown v. Board of Educ., 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958).

[7] The usual transfer option provision permits any pupil to transfer to a school outside of his neighborhood school zone if space is available. Plaintiff's expert in Brinkman v. Gilligan, 503 F.2d 684, 696 (6th Cir. 1974), stated that optional transfer zones

> create instability in the public . . . in terms of housing choices—and in terms of perception of whether a school is going black or staying white . . . so that generally where you have an optional zone which has racial implications, you have an unstable situation . . . these zones accelerated and precipitated further segregation.

It is self-evident that it would be psychologically easier for a white student to transfer to a predominantly white school than for a black student to do the same.

whites to flee. In contrast, a school built on the boundary between white and black neighborhoods has a chance of remaining integrated. The neighborhood school defines the neighborhood just as the neighborhood defines the neighborhood school. The Second Circuit Court of Appeals judicially noted this reciprocal effect in a case in which the school boards had selected black neighborhoods as suitable areas in which to locate schools: "Of course the concentration of Negroes increased in the neighborhood school. *Cause and effect came together.*"[8]

In addition, ghetto areas are often bounded by railroad tracks, rivers, or busy highways. The drawing of school zone boundaries along those seemingly neutral boundaries serves to segregate school populations along racial lines. For example, the Harlem River divided black Harlem from the white Bronx for many years; Cleveland's Cuyahoga River had a similar effect. Following World War II, the Chicago and Northwestern Railway above Lake Street marked the northern tier of the black community in central Chicago. In Detroit, in the early 1940's, Woodward Avenue divided Negro and white residential districts.[9] These same streets and rivers also make convenient boundary lines on a school district map.

The concepts of de facto and de jure segregation remain viable,[10] although a clear-cut distinction between the two in practice is now difficult to discern.[11] Justice Powell indicated in his concurring opinion in *Keyes* that he would have us disregard the distinction entirely. He stated that the fourteenth amendment gives rise to "the right . . . to expect that once the State has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts."[12] However, the majority opinion in *Keyes* retained the distinction and stated that "the essential elements of *de*

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[8] United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967) (emphasis added).

[9] D. CLARK, THE GHETTO GAME: RACIAL CONFLICTS IN THE CITY 29-30 (1962). *See also* D. MCENTIRE, RESIDENCE AND RACE (1960).

[10] However, two significant decisions have refused to acknowledge the distinction. Hobson v. Hanson, 269 F. Supp. 401, 503-06 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 148 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973).

[11] The key issue in breaking down legal distinctions between de jure and de facto discrimination . . . is the concept of shared liability. De facto discrimination necessarily involves policies and practices of a particular defendant or class of defendants which reflect the larger society's discrimination. A neutral or even well-intentioned policy may produce discriminatory results because of prior circumstances beyond the control of the policymaker.

Kushner and Werner, *Metropolitan Desegregation after Milliken v. Bradley: The Case of Land Use Litigation Strategies*, 24 CATH. U.L. REV. 187, 208 (1975).

[12] 413 U.S. at 225-26 (emphasis in original).

jure segregation . . . [are] a current condition of segregation resulting from intentional state action."[13] As a result, between the conceptually pristine concepts of de facto and de jure segregation now lies a perplexing morass created by the Supreme Court's use of the word "intentional" without further definition.

The distinction between de facto and de jure segregation was reasonably clear when *Brown v. Board of Education* was decided in 1954.[14] Subsequently, a plaintiff usually could prove a constitutional violation merely by referring to a state statute on the books in 1954 that required separation of the races.

> Thus the bulk of the law during those years dealt with efforts of the federal trial court, on default of local school authorities, *to fashion effective remedies*, and in the process to overcome persistent efforts at the local level to get around them.[15]

In the South the existence of a dual educational system gave rise to an affirmative duty on the part of school officials to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[16] It has been suggested that "the development that, more than any other, has blurred the distinction between de jure and de facto segregation is the heavy remedial burden the Court has imposed in decisions dealing with southern school desegregation."[17] The prior existence of a state statute authorizing segregated schools has been ample evidence of state action. If such a statute exists, the issue becomes whether or not the schools are in fact segregated; the school boards process of decision making is irrelevant.

The line between de facto and de jure segregation began to blur in a 1961 New York federal district court case, *Taylor v. Board of Education*.[18] It was held that the gerrymandering of school boundaries with a racially segregative *motive* was de jure segregation. *Taylor*

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[13] *Id.* at 205.

[14] *See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

[15] Higgins v. Board of Educ., 395 F. Supp. 444, 481 (W.D. Mich. 1973) (emphasis added).

[16] Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

[17] Goodman, *supra* note 14, at 285.

[18] 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). The neighborhood school system was under attack. Plaintiff's evidence established a rigid adherence to district lines which were established out of a desire to separate whites and blacks, as well as the Board's refusal to institute any plans for desegregation submitted by experts, even on an experimental basis. The *Taylor* court focused on the process of decision making, accepting that "the issue of intent and purpose is controlling"; however, it looked to the result of that process for proof of intent: the court "must look through the guise in which school officials seek to clothe their unconstitutional conduct."

held further that courts should examine the process of decision making and the motives of school board members. If the motives are free of racial taint, there is no affirmative duty to desegregate; the segregation is de facto. However, if segregation of schools *is* racially motivated, the same duty arises in the North as in the South to desegregate the schools. In that district, then, a finding of segregative motivation on the part of the school board became the equivalent of a state statute: both supported a de jure segregation action, and both raised an affirmative duty to desegregate. However, such a motivation on the part of school boards is notoriously difficult to prove. Under this standard, much more would be required of northern plaintiffs than the mere production of a segregative statute. Thus a segregated school system might be tolerated in the North in the absence of proof of segregative motive; it would not be tolerated in the South where, in most cases, the conclusive statute has been present.

This anomalous result appears to flow from an underlying confusion as to *why* segregation is constitutionally prohibited. Is it the segregative statute itself that gives rise to the evil to be corrected? Or is segregation in and of itself so psychologically and emotionally harmful that it violates the equal protection clause? The heavy remedial burden the Supreme Court has imposed on the South clearly implies the latter foundation. However, that foundation is inconsistent with the concept of de facto segregation. Such was the situation in 1973 when the Supreme Court decided its first "northern" school desegregation case, *Keyes v. School District No. 1.*

II. THE *Keyes* DECISION

The *Keyes* decision tied the concept of intent to the concept of de jure segregation. In its discussion of de jure segregation, the Court directed that the federal courts in subsequent decisions must follow a two-step analysis: first, a determination of whether a condition of racial segregation exists; second, a determination of whether that condition results from intentional state activity.

The Court delineated the factors to be considered in making the first determination:

> What is or is not a segregated school will necessarily depend on the facts of each case. In addition to the racial and ethnic composition of a school's body, other factors, such as the racial and ethnic composition of the faculty and staff and the community and administration attitudes toward the school, must be taken into consideration.[19]

[19] 413 U.S. at 196.

Unfortunately, the Supreme Court chose not to expound on the second step of the analysis—the determination of whether the segregation is a result of intentional state action. It provided no definition of intent, nor any guidelines to be considered in subsequent determinations of what constitutes intentional action. In *Keyes*, the Court was able to avoid the issue because the intent to segregate was clearly inferable from gerrymandering of attendance zones and other practices. Perhaps most significantly, the present school board repealed a resolution to desegregate schools in the area, which resolution had been passed by the former school board. This was nearly an admission of segregative motive on the part of the Denver school board. Accordingly, courts that were to address the issue in later, less clear-cut cases had little guidance on what would constitute "intentional state action" in the variety of factual situations to arise.[20]

The intent issue is further complicated by the holding in *Keyes* that

> a finding of intentional segregative school board actions in a meaningful portion of a school system . . . establishes . . . a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.[21]

One commentator wrote shortly after the *Keyes* decision:

> *Keyes* has the potential to sweep through the North overturning school systems as dramatically as *Swann* has in the South. Indeed, the comparison of *Swann* and *Keyes* is striking: a system-wide remedy is secured by empirical proof of current racial imbalance (buttressed in the North by an *easy* finding of intent in a meaningful portion) and justified by a presumption or presumptions.[22]

Subsequent events have shown that this commentator was overly optimistic. The lower courts can easily avoid shifting the burden to the defendant school board by defining intent subjectively, thereby raising the legal standard a plaintiff must originally meet to an almost unreachable level.

It is important to note that the *Keyes* decision did not itself

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[20] "This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971).

[21] 413 U.S. at 208.

[22] Comment, *Keyes v. School District No. 1: Unlocking the Northern Schoolhouse Doors*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 124, 151 (1974) (emphasis added).

precipitate conflicting decisions among the various circuits; it merely failed to eliminate the source of those conflicts. Prior to *Keyes*, the type of evidence necessary to make a prima facie case of discrimination under the fourteenth amendment had varied considerably in the North. At one extreme of objectivity, for example, the trial court in a 1965 Oklahoma decision, took judicial notice of "resistance in all-white communities to Negroes who seek to obtain housing there," as well as "the continuing subordinate position Negroes hold on the economic ladder."[23] The district court found that a neighborhood school policy, "when superimposed over already existing residential segregation initiated by law . . . , leads inexorably to continued school segregation."[24] (Residential patterns in that case had been established by statute and restrictive covenants.) Accordingly, the court ordered that the board of education "must take clear, affirmative, aggressive action to bring about desegregation."[25]

On the other hand, a Kansas case, also decided in 1965, typifies the subjective end of the spectrum. A school board had changed a boundary line with the result that blacks affected by the change would go to a predominantly black school. The school superintendent testified that the change was made to alleviate overcrowded conditions. It was held that the issue was one of "good faith intentions of the school authorities,"[26] and that the board had no "duty to eliminate segregation in fact as well as segregation by intention."[27]

III. Lower Court Disagreement Over The Proper Definition Of Intentional State Activity

Several cases with typical fact situations from various circuit courts of appeals illustrate the differing definitions of intentional state activity since the Supreme Court's decision in Keyes.

The Second Circuit squarely faced the definitional question in *Hart v. Community School Board of Education*.[28] The court acknowledged that the question was not authoritatively settled by *Keyes*, but that "[t]he question is simply by what standard state action is to be judged, whether on the foreseeable consequences of acts or on an indispensable finding that the act or omission was

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[23] Dowell v. School Bd., 244 F. Supp. 971, 975 (W.D. Okla. 1965).

[24] *Id.* at 976.

[25] *Id.* at 982.

[26] Downs v. Board of Educ., 336 F.2d 988, 997 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

[27] *Id.* at 998. *See also* Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *aff'd* 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The district court stated that it "cannot presume that the Board acted in bad faith." 213 F. Supp. at 826.

[28] 412 F.2d 37 (2d Cir. 1975).

racially motivated."[29] The court then reasoned that because the latter standard would be "almost impossible of proof save by admissions," the former is more consistent with the shift of the burden of proof effected in *Keyes*.[30] Consequently, it held that "a finding of *de jure* segregation may be based on actions taken, coupled with admissions made, by governmental authorities which have the natural and foreseeable consequences of causing educational segregation."[31]

Conversely, the Ninth Circuit[32] vacated and remanded a 1971 pre-*Keyes* district court decision[33] which had used the natural and foreseeable consequence standard while assuming that intent was irrelevant. The circuit court gave no direction as to the standard to be used, however; it merely remanded with direction to try the issue of intent on the merits. On remand, the trial court was not called upon to set forth its standard because

> the evidence clearly demonstrates the defendant's intent to segregate its elementary schools. Minutes from August 1934 to June 1939—discovered after the Ninth Circuit's decision in this case—chronicle the School Board's blatant intent to segregate Oxnard's elementary school children.[34]

Thus the district court had evidence that amounted to an admission of purposely maintained dual school systems.

A recent First Circuit decision, while not declaring its standard as explicitly as the Second Circuit, clearly favored the foreseeable consequences test.[35] The court was faced with the traditional argument of a school board that it has no duty to take affirmative steps to eliminate de facto segregation in its schools. The court rejected the defendants' argument.

> Not only is it inconceivable that the repeated rejection of proposals which would promote desegregation could not properly be considered by a court as evidence of an intent to create or maintain segregation, but there can be no doubt that defendants' failures to act are probative evidence of intent . . . .[36]

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[29] *Id.* at 49.

[30] *Id.* at 50.

[31] *Id.*

[32] Soria v. Oxnard School Dist., 488 F.2d 579 (9th Cir. 1973).

[33] Soria v. Oxnard School Dist., 328 F. Supp. 155 (C.D. Cal. 1971).

[34] Soria v. Oxnard School Dist., 386 F. Supp. 539, 540 (C.D. Cal. 1974). The district court found "deplorable words" in the minutes including the 1936 statement that "the Board was in favor of the principle of segregation, although it might not be entirely practical at this time." *Id.* at 541.

[35] Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974).

[36] *Id.* at 585.

The court also noted that "every decision to act for racial balance or to fight it has consequences."[37] It can reasonably be inferred from the court's language that an awareness of segregative consequences from a failure to act is to be treated as evidence of intentional action in the First Circuit.

The Fifth Circuit's approach is now similar to that of the First Circuit.[38] The court has admitted that its earlier "cause and effect" standard[39] for finding a dual school system, or de jure segregation, is no longer a proper one after *Keyes'* requirement of intent. However, it stated in *Morales v. Shannon* that the natural and foreseeable consequences of acts that maintain segregated schools are "strong evidence of segregatory intent."[40] Accordingly, the district court's finding of no segregative intent in that case was held erroneous. The act which was ultimately found to be unconstitutional was the imposition of a neighborhood school assignment system on an area where Mexican-Americans and Anglos had separate residential patterns.

The Sixth Circuit's definition of intent is perhaps the closest to that of the Second Circuit. In *Oliver v. Board of Education*, the court stated that

> a presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation.[41]

The Sixth Circuit, however, permits this presumption to be rebutted by an affirmative establishment that the defendants' "action or inaction was a consistent and resolute application of racially neutral policies."[42] In other words, the rebuttable presumption shifts the burden of proof to the defendant who must then prove that the suspect decision-making process has been racially nondiscriminatory.

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[37] *Id.* at 586.

[38] Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975).

[39] The Fifth Circuit's "cause and effect" standard was presented in *Cisneros v. Corpus Christi Independent School Dist.*, 467 F.2d 142 (5th Cir. 1972).

[40] 516 F.2d at 413.

[41] 508 F.2d 178, 182 (6th Cir. 1974).

[42] *Id.* at 182. The Sixth Circuit's choice of the word "neutral" was an unfortunate one. The *Keyes* decision states that "it is not enough . . . that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions" in discharging their burden 413 U.S. at 210. The Supreme Court, however, later distinguishes a "racially neutral explanation" from practices that were not taken in effectuation of a policy to create or maintain segregation or "were not factors in causing the existing condition of segregation in these schools." 413 U.S. at 214. The Court stated that this latter *policy*, which by its terms eliminates intentional activity, did affirmatively discharge the Board's burden. The Sixth Circuit clearly refers to this latter policy and not to the former unacceptable explanation or rationalization.

In *Brinkman v. Gilligan*,[43] a Dayton, Ohio, desegregation case, the Sixth Circuit was faced with a factual situation remarkably like that in *Keyes*. In Dayton, as in Denver, there were racially imbalanced schools, optional attendance zones, and the rescission by the Dayton school board of three desegregation resolutions passed by earlier boards. The case was appealed three times, the latter two appeals going to the issue of sufficiency of remedy. The appellate court stated simply: "Although the phrase 'de jure' does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices."[44]

A third Sixth Circuit decision, *Higgins v. Board of Education*,[45] strongly implies the use of the foreseeable consequences standard. In that case the appellate court affirmed a district court decision finding an *absence* of segregative intent because "the phenomenal increase in the black population in Grand Rapids was *not clearly foreseeable* until the imbalances were so advanced that a far-reaching reshuffling would have been required to correct them."[46] It was also significant that the Grand Rapids school board did have a desegregation plan in effect.

In summary, two distinct standards have arisen since *Keyes* for raising the presumption of intentional state activity that must accompany a finding of de jure segregation: foreseeable consequences and racial motivation. In addition, there are two distinct standards for rebutting that presumption: the Sixth Circuit permits a showing of a nondiscriminatory decision making policy, while the Second Circuit requires affirmative desegregative action.

It appears that the professed difficulty in defining "intentional" state activity is, in reality, the concern of courts over the remedy of complete desegregation which is generally mandated. This concern could be partially alleviated by a separation of the issues of causation and remedy. Clearly, a court will require a higher level of proof of intent to establish the plaintiff's prima facie case if it is convinced that a presumption of intentional state activity shifts the burden to the defendant to prove it took affirmative action to desegregate. In that situation, the allocation of the burden of proof would appear to be

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[43] 503 F.2d 684 (6th Cir. 1974).

[44] 518 F.2d 853, 854 (6th Cir. 1975): The third appeal is Brinkman v. Gilligan, No. 76-1854 (6th Cir. filed July 26, 1976).

[45] 508 F.2d 779 (6th Cir. 1974).

[46] *Id.* at 790 (emphasis added). The *Higgins* case raises another disputed issue: whether the school board may take the prospect of "white flight" into account during its decision-making process.

dispositive as in the South and in the Second Circuit. If, however, the Sixth Circuit's approach is followed, the burden of proof that shifts to the defendant can be met by proof of a racially nondiscriminatory policy. Thus the plaintiff, to establish his prima facie case, must prove that a reasonable school board member could have foreseen the segregative results of a specific action. The defendants then have the burden of proving the resolutely nondiscriminatory character of their decision-making process. The shift of the burden of proof is therefore less likely to be dispositive.

IV. *Husbands v. Pennsylvania*

The factual pattern of *Husbands* is a typical one. Delaware County, Pennsylvania, had a nonwhite population of about seven per cent. However, two of the county's fifteen school districts, Chester City and Chester Township, had 67.9 percent and 62.1 percent black student bodies, respectively. The great majority of the county's black children received their education from these two school districts.[47] The county school district's 1968 reorganization plan, which presented the issue of de jure segregation in *Husbands*, merged the two predominantly black school districts.[48] The less than startling result: a single unit, Unit 12, with a black school population that had increased by 1972 to seventy-one percent of the total number of pupils. Moreover, four other units with black populations ranging from zero to eight percent abutted Unit 12.[49]

Other aspects of the Chester City area set forth by the district court were also unhappily familiar: low average family income, a low median value of housing units, a high percentage of families on public assistance, and so forth.[50] In other words, Delaware County presented the American racial paradigm: a poor black school district surrounded by more affluent white districts, and a decision[51] by the school board to maintain the status quo.[52]

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[47] 395 F. Supp. 1107, 1116-17 (E.D. Pa. 1975).

[48] Reorganization was mandated by the Act of July 8, 1968, No. 150, [1968] Pa. Laws 299 (codified at 24 PA. STAT. § 2400 *et seq.* (Supp. 1974)). 395 F. Supp. at 1114.

[49] 395 F. Supp. at 1119.

[50] *Id.* at 1122-23.

[51] Mr. Clyde Dalton, Executive Director of the Delaware County Intermediate Unit, testified that the County Board did not seriously consider the merging of the City of Chester with any of the larger contiguous school districts because "there was no need here to be serving the City of Chester by enlarging it with a large district. The need was to help [to increase the tax base of] the other districts that were adjacent to Chester." Brief for Plaintiff at 9.

[52] A decision to maintain the status quo is virtually impossible in a racially paranoid society. At best, white movement into the area halts; at worst, white movement away from the area precipitates. From 1968 to 1972 the Chester City black population rose from sixty-four percent to seventy-two percent. 395 F. Supp. at 1117.

The Chester City area of Delaware County is paradigmatic in more ways than its racial makeup. Racial problems had surfaced in Chester in 1963 when black residents began demonstrating against their segregated schools. The school board denied any responsibility, claiming that the segregation had resulted from residential patterns over which it had no control.[53] In April, 1964, the Pennsylvania Human Relations Commission (PHRC) intervened and, after hearings, found that segregated schools were being maintained, that school zones confined black children to black schools, and that no affirmative plans were being accepted or implemented by the board which would effectively desegregate the schools.[54]

The *Husbands* court found that Unit 12 presented a segregated condition,[55] the first of two requirements for actionable segregation. Also, the court found that "the state action which brought the unit into existence [the reorganization plan] created or contributed to its having the segregation it contained,"[56] and that the school boards had been aware of the racial consequences of their actions.[57] Although the Third Circuit Court of Appeals had never set forth a standard by which to decide whether segregative intent exists, the *Husbands* court had before it the Second Circuit's decision holding that intent under *Keyes* requires a showing of "actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequences of causing educational segregation."[58] The facts of *Husbands* clearly met the standard adopted by the Second Circuit. However, the district court specifically rejected the "natural and foreseeable consequences" test, holding that subjective purpose to discriminate is the standard of intent under *Keyes*.[59]

The *Husbands* court did not stop here, but continued its analysis by interpreting the holding in *Keyes* that

> a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . . established . . . a prima facie case of unlawful segregation design on the part of school authorities, and *shifts to those authorities the burden of proving that*

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[53] Human Relations Comm'n v. Chester, 427 Pa. 157, 233 A.2d 290, 292 (1967). The six schools in question ranged from 87 percent to 100 percent. 427 Pa. at 178, 233 A.2d at 301.

[54] *Id.* at 162, 233 A.2d at 293.

[55] 395 F. Supp. at 1137.

[56] *Id.* at 1139.

[57] *Id.* at 1141.

[58] Hart v. Community School Bd. of Educ., 512 F.2d at 50.

[59] 395 F. Supp. at 1132, 1133. Dictum in Washington v. Davis, 44 U.S.L.W. 4789 (1976), indicates the agreement of Mr. Justice White with this aspect of the *Husbands* opinion.

other segregated schools within the system are not also the result of intentionally segregative action.[60]

The *Husbands* court carefully defined what it understood *Keyes* to mean by "prima facie case":

> [T]he plaintiff's evidence not only compels defendant to produce evidence on the issue in question, but also shifts the burden of proof to the defendant on this issue. In other words, the plaintiff's evidence establishes a presumption in favor of his contention on the issue, and shifts the risk of non-persuasion on the issue to the defendant.[61]

The *Husbands* court did recognize that the presumption created by the *Keyes* rule, and the underlying rationale of this rule, are not necessarily limited to the situation in which the prima facie case of intent is established by a showing of subjective intent in a small part of the school district. The court stated that "[g]iven the facts of *Keyes*,"—that subjective intent was clearly present as to the small area—

> this holding is clear enough, but the rationale on which the Court reached this conclusion and holding is less clear. The above-quoted language lends itself to two different interpretations of the Court's rationale.
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> The first is that the burden of proof shifted because of the special probative value, insofar as the issue of segregation in part of a school system is concerned, of a finding of intentional segregation in another, significant part of that system. In effect, this rationale would shift the burden of proof only in cases where such a finding had occurred concerning a significant part or all of the school system in question.
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> The second interpretation of the Court's rationale, however, is that the burden shifted because the finding of intentional segregation in one substantial part of the system established a prima facie case as to whether intent underlay segregation in any other part of that same system. Under this interpretation, the emphasis falls upon the concept of a prima facie case, rather than the particular means by which it is established in a given case. While a finding of intentional segregation in another part of the system in question is one way to establish such a case, it is not necessarily the only way. Such rationale would dictate that regardless of the means of evidence by which a plaintiff establishes a prima facie case, once he has established such case the burden of proof shifts as readily as it did in *Keyes*.[62]

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[60] 413 U.S. at 208 (emphasis added).

[61] 395 F. Supp. at 1139.

[62] *Id.* at 1135-36.

It clearly makes good policy sense to accept the second, broader interpretation of the *Keyes* presumption rule. When the plaintiffs have shown strong, albeit circumstantial, evidence of motivation, the burden of proof should shift, since the school board has access to the reasons for its actions, and plaintiffs usually do not have this access.[63]

However, the *Husbands* court chose not to resolve the issue of whether a prima facie case could be established in more than one manner; rather, the court accepted *arguendo* the more expansive view of how to trigger the *Keyes* presumption, and proceeded to consider the issue of whether the plaintiffs had indeed presented a prima facie case on the issue of intent.[64]

The *Husbands* court then reasoned that intent meant subjective purpose or motive; that the plaintiffs had submitted no "direct evidence of segregative intent, and only circumstantial evidence of a limited extent";[65] and that, therefore, the plaintiff's evidence did not constitute even a prima facie case of intent to segregate the black students in Unit 12. However, this analysis is logically unsound. If, as assumed by the court, a prima facie case can be established by evidence of a different type than that of subjective intent concerning a small area, then it makes no sense to require the plaintiff to prove subjective intent as part of this prima facie case, since this is precisely the burden which is placed on the defendant through the effect of the presumption. The *Keyes* presumption rule becomes meaningless under this analysis.

However, the *Husbands* court did retract from this position to some extent. The court stated that the primary reason for its refusal to find a prima facie case here was not the lack of evidence on subjective intent:

> Our principal hesitation against holding that plaintiffs' evidence established a prima facie case on intent stems from the complete absence of any evidence whatsoever of the feasibility of alternative reorganization plans for the component districts of Unit 12.[66]

The court quickly noted that the plaintiffs need not treat the feasibility issue exhaustively; it recognized that the board has better access

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[63] The burden of proof of intent in a civil action such as this should be distinguished from a criminal proceeding, in which proof of a mental element is placed on the government for important policy reasons absent here. Furthermore, such general presumptions on the issue of intent have been created in several types of civil actions against the government under 42 U.S.C. §§ 1981 and 1983. *See* 395 F. Supp. at 1136-1137.

[64] 395 F. Supp. at 1137.

[65] *Id.* at 1140.

[66] *Id.*

to the facts. Indeed, the court stated that, "we would perhaps hold, for example, that once plaintiff produces some evidence on the feasibility issue, the burden of proof on such issue falls to the defendant."[67]

It is difficult to see the logic behind the district court's line drawing. The decision to make the showing of feasible alternative plans a required part of a plaintiff's prima facie case rather than an element of a defendant's defense after the burden has shifted seems an arbitrary one. Because of its decision that the plaintiffs had not established a prima facie case, the *Husbands* court did not have to confront the issue of what standard of proof a defendant must meet to carry its burden: whether or not evidence of neutral decision making is sufficient. It is clear, however, that the *Husbands* court felt that the assignment of the burden of persuasion would be dispositive in a desegregation case such as that one. In addition, evidence of feasible alternative plans does not necessarily seem to be any more "direct" proof of segregative purpose or motive than the mass of other evidence that was submitted by the *Husbands* plaintiffs. As the plaintiffs argued in their brief, "[i]t is only common sense that under Act 150, since reorganization was limited to contiguous school districts, that if, for example, Chester Township was not placed in the Chester-Upland School District, then it would have had to be placed in some other contiguous school district.[68] Thus an alternative was in fact offered. Furthermore, the 1968 desegregation directive issued by the PHRC, the mass of statistics showing a history of segregation, and an increase in segregation following the reorganization added to the plaintiff's proof. Given the typical lack of access to evidence of motivation on the part of the plaintiffs, it is indeed difficult to conceive of any proof of intent other than that which is circumstantial when intent is equated with motive rather than with foreseeable consequences.

One of the assumptions on which the Second Circuit based its decision on the proper standard in *Hart v. Community School Board of Education* was the difficulty of proof under the motive or purpose standard, since to require a finding of purpose or motivation would be to establish a standard "almost impossible of proof save by admission."[69] Judge Newcomer of the *Husbands* court disagreed and pointed out in his opinion that "[i]ntent, even in the sense of purpose or motive, may readily be inferred in the proper circumstances . . . ."[70] In addition, he noted that *Keyes* requires only a showing

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[67] *Id.*at 1142.

[68] Supplemental Brief for Plaintiff at 5-6.

[69] 512 F.2d 37, 50 (2d Cir. 1975).

[70] 395 F. Supp. at 1134.

that segregative intent or purpose is one, not necessarily the dominant or only, factor.[71] One wonders, however, what the "proper circumstances" will be in the more difficult cases of the future.

V. CONCLUSION

In the two decades that have passed since the Supreme Court first held that separate but equal schools were constitutionally prohibited, the Court has made it clear that nothing short of aggressive affirmative action on the part of southern school officials to eliminate all vestiges of segregation from their school systems is acceptable. Nearly twenty years after *Brown*, however, the Court heard its first northern desegregation case and held that the de facto-de jure distinction remains valid for the North. The Court decided in *Keyes* that *intentional* state action must be present to justify a finding of de jure segregation, and also arguably concluded that once a prima facie case of intentional state action has been established the burden shifts to school officials to show the economic or other proper bases for their actions.

Since 1973, the lower courts have differed in their interpretations of the quantum and type of evidence necessary to prove intent under *Keyes*. Two standards are currently employed to determine intent—the tort standard of foreseeable consequences and the motive or bad faith standard. The latter is notoriously difficult to meet, since it requires evidence on the level of admissions. Moreover, it gives rise to conflicting decisions flowing from fundamentally similar factual patterns depending on whether "proper circumstances" are present. In addition, this motive test creates disparate standards for the North and South. In contrast, the foreseeable consequences test permits an accumulation of circumstantial evidence to prove segregative intent. This test is particularly appropriate where, as in the Sixth Circuit, a showing of intentional state action is not conclusive, but merely shifts the burden to the school board to justify its actions as racially nondiscriminatory. This is when the good faith of the defendant school board logically ought to be determined, and the burden naturally ought to be on the school board because of its access to records of its decision-making process.

If, however, intent is equated with motive and proof of bad faith is a necessary part of a plaintiff's prima facie case, the shift of the burden to the school board to prove affirmative action to desegregate is unlikely to occur. Such is the unfortunate effect of the interpreta-

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[71] *Id.* at 1134.

tion which the Pennsylvania district court applied in *Husbands v. Pennsylvania.* Although several Circuit Courts of Appeals have devised varied but workable interpretations of this element of *Keyes*, the Third Circuit has not. It is submitted that the Third Circuit should avoid future rulings such as *Husbands* by adopting a tempered standard similar to that employed in school desegregation cases by the Sixth Circuit.

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